SUPREME COURT, U. S.

Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 73-1023

EVERETT STEAMSHIP CORPORATION, S/A,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Petitioner Everett Steamship Corporation, S/A respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 5, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is set forth in Appendix A and the opinion of the Dis-

trict Court for the Northern District of California, reported at 1970 A.M.C. 2213, is set forth in Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 5, 1973. This Petition for Certiorari is being filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a party who makes advances to a vessel which would immediately be enforceable *in rem* but for the Suits in Admiralty Act policy prohibiting *in rem* enforcement against vessels in Government service can recover the amount of the lien from the Government through *in personam* suit as provided in the Suits in Admiralty Act; or, as held by the Courts below, is a party limited to a much lesser recovery resulting from sharing with other claimants in the proceeds of sale in an *in rem* suit after the Government had completed use of the vessel, thereby terminating the Suits in Admiralty Act prohibitions against *in rem* seizure.

STATUTES INVOLVED

The Suits in Admiralty Act (Title 46 U.S.C. §741, *et seq.*):

[Text in full in Appendix C]

STATEMENT OF THE CASE

The S.S. GALICIA DEFENDER was an American-flag merchant vessel time-chartered by the United States from her owners, Liberty Navigation and Trading Co., Inc. (hereinafter "Liberty"). Petitioner Everett Steamship Corporation, S/A (hereinafter "Everett"), a Panamanian corporation, was husbanding agent for the vessel in Far Eastern ports, while it was under this time charter. Between February 1, 1967, and February 2, 1968, Everett advanced $20,040.47 for repairs, supplies and wages for the crew.

In May, 1968, the vessel, loaded with cargo for Vietnam, lay idle in the Port of San Francisco because her owners could not pay the crew. The United States then suspended the time charter and, on May 4, 1968, bareboat or "demise" chartered the vessel for a round-trip voyage to Vietnam. (Under this arrangement the United States paid the crew.) On May 17, 1968, while the GALICIA DEFENDER was under the demise charter to the United States, Everett filed a complaint *in personam* and *in rem* praying for recovery of its advances. The complaint proceeded directly against United States of America pursuant, *inter alia,* to the provisions of the Suits in Admiralty Act (46 U.S.C. §741, *et seq.*). At the time of filing, the GALICIA DEFENDER was outside the jurisdiction of the United States District Court for the Northern District of California, on its demise charter voyage to Vietnam and return. The complaint alleged not only the existence of the maritime liens in the above stated amount, and the exercise of an *in personam* cause of action against the United States, but, also, the allega-

tion that the vessel would be within the geographical jurisdiction of the trial court within the pendency of process under the complaint.

On June 17, 1968, the United States filed an answer to Everett's complaint alleging lack of jurisdiction because the vessel was outside the territorial waters of the district,[1] and further asserted that 46 U.S.C. §742 did not apply because no action could have been maintained if the vessel had been privately operated.

On June 24, 1968, the GALICIA DEFENDER entered the Port of Oakland, (within the Northern District of California) having completed its transport of military cargo to Vietnam. She was at this time seized in an *in rem* action brought by West Coast Ship Chandlers and others. The United States declared the GALICIA DEFENDER off-hire, and the vessel was sold to pay maritime liens. Everett ultimately intervened in the ongoing *in rem* action against the vessel, but recovered only $1,935 because other liens had higher priority.

Upon motion by the United States, the trial court dismissed the complaint *in personam,* with leave to amend, in an order dated May 28, 1970. Everett then filed an amended complaint, again alleging the existence of facts supporting its claim of a maritime lien, and time and demise charters to the United States which prevented Everett from seizing or arresting the vessel, and continuing to assert its *in personam* claim both against United States and against Liberty. On October 6, 1970,

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[1]This special defense was discussed by the Court below but the issue presented in the within writ was dispositive of the appeal.

the trial court granted the United States' motion for summary judgment. On October 5, 1973, the United States Court of Appeals for the Ninth Circuit affirmed, over a strong dissent by Judge Trask.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS AN IMPORTANT QUESTION OF INTERPRETATION OF THE SUITS IN ADMIRALTY ACT.

The Courts below have misread crucial portions of the Suits in Admiralty Act, resulting in the denial to Petitioner of the relief accorded by that Act. The majority below held that Everett was entitled only to its *pro rata* share of the proceeds from the *in rem* proceeding in which it intervened against the vessel, and no more. As the dissenting opinion correctly points out, this holding is directly contrary to the plain wording of pertinent provisions of the Suits in Admiralty Act. Specifically, the majority determined that §746 of the Act, which reserves to the United States the benefits of all exemptions and limitations of liability accorded by law to owners, charterers, operators or agents of vessels, transforms the *in personam* remedy provided in §742 of that Act into, in reality, nothing more than *in rem* rights. This holding is clearly erroneous.[2]

The principal purpose of the Suits in Admiralty Act was to negate the judicial result of the Shipping Act

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[2]The "limitations of liability" reservations were clearly intended to cover only the shipowner's right to limit his damages in certain situations to the value of the vessel and her freight then pending. 46 U.S.C. §§181-189. See, *e.g.*, *U.S. v. Sandra & Dennis Fishing Corp.*, 372 F.2d 189 (1st Cir. 1967).

of 1916 that Government-owned or operated merchant vessels could be arrested and seized the same as private merchant vessels. (See, *e.g., The Lake Monroe,* 250 U.S. 246 (1919).) In return for this special immunity (set forth in §741 of the Act), Congress provided a specific *in personam* action against the United States. See *Blamberg v. United States,* 272 Fed. 978, aff'd. 260 U.S. 452 (1921); *Senate Report No. 223,* 66th Congress, First Session, *House Report No. 497,* 66th Congress, Second Session; *Brady v. Roosevelt Steamship Co.,* 317 U.S. 575, cert. denied 319 U.S. 763 (1943). This special *in personam* cause of action is provided in §742 of the Act:

> "In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United

> States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States."

This section must be read in light of the preceding §741, which provides:

> "No vessel owned by the United States . . . or operated by or for the United States . . . shall, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions."

The very purpose of the Act is to permit recovery not only *in rem,* but in *in personam* as well. This becomes even more evident by a plain reading of §743 of the Act:

> "If the libelant so elects in his libel, the suit may proceed in accordance with the principles of libel in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. . . ."

Thus, §741 exempts from seizure vessels owned or operated for or by the Government, whether such seizure results from liens for which the Government would otherwise be liable *in personam,* or results from liens against the ship for which the Government would not otherwise

be directly liable. It is arrest and seizure that is prevented by §741, not particular kinds of arrest and seizure. This follows logically from the purpose of the Act, which was to prevent the interruption of Government operations, even though those operations might be considered merchant in nature. It necessarily follows that the phrase "a proceeding in admiralty" under §742 must include, at least, the proceedings in admiralty designed to arrest or seize a vessel referred to in §741.

In the case at bar, Everett alleged the existence of valid maritime liens and the inability to seize the vessel by reason of its operation by the United States and, therefore, it was proceeding under §§741 and 742 of the Act for *in personam* relief. It is clear that at all times Everett continued to insist on the *in personam* remedy against the United States provided for in the Act. Nonetheless, the majority below, relying on *McMahon v. Pan American World Airways, Inc.*, 297 F.2d 268 (5th Cir. 1962), affirmed the dismissal of Everett's *in personam* action on the basis that Everett obtained all that it was entitled to under the Act—its share of the *res*. *McMahon* does not so hold; in fact, the few authorities recognizing the issue have assumed just the opposite. See, *e.g.*, *Hudson Trading Co. v. United States*, 272 U.S. 675 (1927) [Dictum].

The precise question presented herein, however, has not been decided by this Honorable Court.

It is submitted that the instant case provides the ideal opportunity to so decide. In addition to the opportunity to reverse an erroneous decision, the instant controversy allows this Honorable Court to clearly con-

firm the purpose of the Suits in Admiralty Act, in line with serious policy considerations involved herein.

One must recognize that what is involved in the instant matter is not whether the United States or Liberty, the entity with which the Government had dealt, may be ultimately liable. Even if Everett should finally recover in this case, the United States will retain its rights against Liberty for indemnity under its various charter-party contracts. The issue, rather, is who should bear the risk of Liberty's potential inability to respond to judgment after one of its principal assets—the vessel—is made immune to seizure for the benefit of the United States Government. It is submitted that the purpose of the Suits in Admiralty Act was to place this risk directly on the United States. In the case at bar, this risk has not been transferred; Everett has been told it may only look to the *res* for relief.

This is decidedly unfair, not only because the value of Everett's *in rem* remedy against the vessel diminished while it was protected from seizure because other liens were incurred with higher priority, and continuing depreciation of the vessel, but because the advances made by Everett contributed to the vessel's performance of the very Government service which the policy of the Suits in Admiralty Act prevented Everett from collecting *in rem*. Thus the Government obtained the benefit of the advances but, because of the interpretation of the statutes by the Courts below, escapes the intended reciprocal burden of satisfying the advances. Everett submits that this result is contrary to the policy and literal wording of the Suits in Admiralty Act and must be reversed.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
December 28, 1973.

Respectfully submitted,
FRANCIS L. TETREAULT,
DAVID C. NOLAN,
Counsel for Petitioner.

(Appendices Follow)

Appendix A

United States Court of Appeals for the Ninth Circuit

Everett Steamship Corporation, S/A, *Appellant*, vs. Liberty Navigation and Trading Co., Inc.; SS Galicia Lee, ex SS Norberto Capay, her engines, tackle, etc.; SS Galicia Defender, ex SS Santa Emilia, her engines, tackle, etc.; SS Galicia Navigator, ex SS Our Lady of Peace, her engines, tackle, etc., and the United States of America, *Appellees.*	No. 71-1009

[October 5, 1973]

Appeal from the United States District Court for the Northern District of California

Before: HAMLIN and TRASK, Circuit Judges, and SOLOMON, District Judge.*

SOLOMON, District Judge:

Everett Steamship Corporation (Everett), a Panamanian corporation, filed this action against the United States (the Government) to recover on maritime liens on

*Honorable Gus J. Solomon, United States Senior District Judge for the District of Oregon, sitting by designation.

the SS Galicia Defender. The District Court granted summary judgment against Everett. Everettt appeals.

The Government time chartered the Galica Defender from Liberty Navigation and Trading Co., Inc. (Liberty). While under the time charter, Everett was the husbanding agent for the vessel. Between February 1, 1967, and February 2, 1968, when the vessel was in far eastern ports, Everett advanced $20,040.47 for repairs, supplies, and wages for the crew. Everett claims a maritime lien against the vessel for those amounts.

In May, 1968, the Galicia Defender, loaded with cargo for Vietnam, lay idle in the Port of San Francisco because Liberty could not pay the crew. Rather than bear the expense of unloading the cargo, the Government suspended the time charter and, on May 4, 1968, demise chartered the vessel for a round trip voyage to Vietnam.

On June 24, 1968, the Galicia Defender returned from Vietnam. It entered the Port of Oakland where it was seized in an *in rem* action brought by West Coast Ship Chandlers and others. The Government declared the Galicia Defender off-hire and the vessel was sold to pay maritime liens, Everett intervened. It recovered only $1,935.00 because other liens had higher priority.

Five weeks before the seizure in the *in rem* action and when the Galicia Defender was outside the territorial waters of the United States on her way to Vietnam, Everett filed this action. The complaint alleged that the United States, as demise charterer, was owner *pro hac vice*, 46 U.S.C. § 186, and that Everett was unable to libel the vessel *in rem* because of 46 U.S.C. § 741. The complaint claimed a maritime lien on the Galicia Defender

and asserted that the lien was enforceable against the Government by a libel *in personam* under the Suits in Admiralty Act, 46 U.S.C. § 742.

In its answer the Government alleged that the court lacked jurisdiction because the vessel was outside the territorial waters of the district and asserted that 46 U.S.C. § 742 did not apply because no action could have been maintained if the vessel had been privately operated. The Government also stated that the vessel was on its way to Vietnam and would be redelivered to its owner upon its return to the United States.

The District Court dismissed the complaint with leave to amend in an order dated May 28, 1970. Everett then filed an amended complaint in which it also claimed damages against the Government for the loss of priority of its lien because 46 U.S.C. § 741 prevented it from libeling the vessel *in rem*. On October 6, 1970, the court granted the government's motion for summary judgment. The court held that Everett's inability to libel the Galicia Defender was because of the vessel's absence from the jurisdiction and not because of any immunity under Section 741. The court also ruled that the arrest and sale of the ship did not violate Section 741.

The Suits in Admiralty Act (the Act) prohibits maritime lienholders from seizing vessels in *in rem* actions if the vesels are owned or operated by the United States. 46 U.S.C. § 741. As a substitute for recovering against the vessel, the Act allows lienholders to enforce their liens through *in personam* actions against the Government. 46 U.S.C. § 742. The Act reserves to the United States the benefits of all exemptions and limitations of

liability accorded by law to owners, charterers, operators, or agents of vessels. 46 U.S.C. § 746. The Act also seeks to protect government vessels from seizure in foreign ports by giving the Secretary of State discretion to intervene in foreign proceedings. 46 U.S.C. § 747.

As a demise charterer the government was liable only *in rem* for debts incurred on the credit of the vessel before the demise charter. When Everett filed its complaint on May 17, 1968, the District Court had no *in rem* jurisdiction since the vessel was outside the waters of the United States. *Blamberg Bros. v. United States,* 260 U.S. 452 (1923).

Everett argues that the District Court had jurisdiction over an *in personam* action under Section 742 to enforce an *in rem* liability even though the vessel libeled was not within the territorial waters of the United States. Everett contends that Section 742 transformed its *in rem* rights into an *in personam* cause of action.

There is no merit in this contention. In all of the cases Everett cites to support this contention, the Government had *in personam* liability under the common law or the law of admiralty. No case held that an *in rem* action was made *in personam* by Section 742 for the purposes of jurisdiction.

In *Eastern Transportation Company v. United States,* 272 U.S. 675 (1926), the Government breached its statutory duty to mark the wreck of a government-owned merchant vessel that sank in a navigable channel. Plaintiff's barge collided with the sunken wreck and sank. The trial court held that the sunken vessel did not provide a *res* which would support an *in rem* action. The Supreme

Court reversed. It held that the breach of the duty to place a marker on the wreck created a direct cause of action in tort against the Government for which plaintiff could maintain an *in personam* action. When the Government had *in personam* liability, Section 742 did not require that damages be limited to the value of the vessel under *in rem* principles.

In *Hoiness v. United States,* 335 U.S. 297 (1948), a seaman was injured aboard a merchant vessel owned by the United States. The complaint did not allege that the plaintiff was a resident of the district in which the action was brought or that the vessel was within the district when the complaint was filed. The District Court dismissed for lack of jurisdiction. The Supreme Court reversed and held that the provision in Section 742 that the plaintiff be a resident of the district or that the vessel be located within the district related to venue and not jurisdiction.

The broad holding in *Hoiness* must be read in connection with the facts of the case which show *in personam* liability. The defect there was not jurisdictional because the Government had *in personam* liability for injuries suffered on government-operated merchant vessels. The opinion did not cite *Blamberg* or discuss jurisdictional requirements when the Government had *in rem* liability only.

Everett contends that even if the court did not have jurisdiction when the complaint was filed, it acquired jurisdiction when the Galicia Defender returned to United States waters. Everett cites *Warren v. United States,* 179 F.2d 919 (2d Cir., 1949), *rev'd on other grounds,* 340 U.S.

523 (1951), and *Carroll v. United States,* 133 F.2d 690 (2d Cir. 1943). Both *Warren* and *Carroll* were cases in which the Government was liable *in personam,* not *in rem,* and *Warren's* holding was limited to venue, not jurisdiction.

Even if the court did acquire jurisdiction, Everett would not be entitled to any relief. The Government would be liable only for the value of the vessel, just as a private demise charterer in an *in rem* action. *See The Minnesota,* 20 F.2d 926, 928 (E.D. La. 1927). Even before its first complaint was dismissed, Everett had already received all the relief to which it was entitled because it had received its *pro rata* share of the value of the vessel, based on the priority of its lien.

Everett claims that the United States is liable in damages for the loss in value of its maritime lien. It asserts that during the period that the Galicia Defender was under the time charter, as well as when it was under the demise charter, the vessel was immune from arrest by virtue of Section 741. Everett argues that it was impractical for political and economic reasons to libel the vessel in Vietnam or in any other foreign port and that the Government prevented it from arresting the vessel before the higher priority liens accrued.

In the District Court Everett admitted that it had no legal authority to support this "novel approach". There was nothing to prevent Everett from bringing this action under Section 742 many months earlier when the Galicia Defender was in a port of the United States or from seizing it in a foreign port. The Government is not responsible for the loss in value of Everett's lien caused by its

own delay in failing to pursue the remedies allowed by law.

Everett also contends that the Government did not have the right to release the Galicia Defender to its creditors because vessels operated by the United States are immune from *in rem* execution under Section 741. It relies on *Hudson Trading Company v. United States* (THE ABERFOIL), 28 F.2d 744 (3rd Cir. 1928).

Section 746 reserves to the United States the benefit of all exemptions and all limitations of liability accorded by law to owners, charterers, operators, or agents of vessels. In our opinion Section 746 qualifies Section 741 and allows the Government to permit judicial seizure of merchant vessels chartered by the Government when necessary to enable it to limit its liability according to law. *See* 46 U.S.C. § 185. The Court in THE ABERFOIL did not consider the interrelation of these two sections.

To the extent that the majority opinion in THE ABERFOIL holds that the Government could not release the vessel to the lienors and could not waive its immunity under Section 741, we think that the majority opinion is incorrect and choose not to follow it.

Section 742 does not give a lienholder greater rights against the Government than it would have against a private charterer. *See McMahon v. Pan American World Airways, Inc.*, 297 F.2d 268, 269 (5th Cir. 1962); *see also State of Maine v. United States*, 134 F.2d 574, 575 (1st Cir. 1943), *cert. denied*, 319 U.S. 772 (1943), cited in *Allen v. United States*, 338 F.2d 160, 162 (9th Cir. 1964), *cert. denied*, 380 U.S. 961 (1965). Everett was unable to libel the vessel because she was on the high seas, not because

it was owned by the United States: Everett would have been equally unable to seize the vessel had it been privately owned. Everett recovered in the *in rem* action the full amount to which it would have been entitled as a lienholder against a privately operated vessel. It is entitled to no more.

AFFIRMED.

TRASK, Circuit Judge (dissenting):

I respectfully dissent.

The majority reasons that the district court had no jurisdiction to grant relief to Everett because the Galicia Defender was outside the territorial waters of the United States when the original complaint was filed. That complaint alleged that the vessel would be within the geographical jurisdiction of the court during the pendency of the action.

On June 17, 1968, the United States filed an answer in which it admitted that the vessel was expected within the jurisdiction on or about June 26, 1968. It denied that there was any process pending for her arrest at the instance of Everett.[1] It also alleged as a separate defense that side the waters of the district.

That defense was not called to the attention of the trial court until August 12, 1969, by a motion for judgment on the pleadings. In the meantime, however, on

[1]The complaint was one in intervention in a libel filed by Oakland Dock & Warehouse Company and then pending against Galicia Defender and two sister ships. The United States answered voluntarily according to the record here. An order was made consolidating seven separate libels but preserving the distinction between the libels of others and that of Galicia Defender.
the court lacked jurisdiction because the vessel was out-

June 24, 1968, the Galicia Defender entered the territorial waters of the district and proceeded to San Francisco where she arrived at 1918 hours Pacific Daylight Saving Time on June 24, 1968. At the time the motion for judgment on the pleadings was heard on September 12, 1969, the defect that the vessel was outside the jurisdiction had been cured. Indeed, the trial court's order did not even mention this defense of lack of jurisdiction but denied relief for failure of the complaint to allege a cause of action upon which relief could be granted. It allowed Everett twenty days within which to file an amended complaint.[2]

The order granting summary judgment from which the instant appeal was taken was addressed to that amended complaint. It was filed June 17, 1970. Again, it alleged the existence of facts which would support its claim of a maritime lien,[3] the time and demise charters to the United

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[2]Under these circumstances *Blamberg v. United States*, 260 U.S. 452 (1923), does not apply. In that case the vessel against which relief under the Act was asserted, was, at the date of the filing of the libel in a foreign port where it remained at all times thereafter. *Cf. Eastern Transportation Co. v. United States*, 272 U.S. 675 (1927); *Warren v. United States*, 179 F.2d 919 (2nd Cir. 1949).

[3]The original complaint as well as the amended complaint asserted maritime lien claims for advances for the payment of crew's wages and furnishing of repairs, supplies and other necessaries. In the amended complaint for the period between February 1, 1967 and February 2, 1968, the amount was alleged to be the sum of $20,040.47. Such advances create maritime liens, 1 Benedict on Admiralty 17-20 (6th ed., 1940), and were the vessel privately owned and operated, a proceeding in admiralty could be maintained to enforce them. Claim was also asserted *ex contractu* against Liberty, as owner, under Everett's appointment by Liberty as husbanding agent for the ship. A "husbanding agent" or "port agent" is one who assists the vessel and its master in getting in and out of port, purchases supplies and stores, advances funds for payment of wages, procures repairs, etc. *Dorn v. Balfour, Guthrie & Co.*, 155 F. Supp. 203 (N.D. Cal. 1958), aff'd. 262 F.2d 48 (9th Cir. 1958).

States which prevented Everett from seizing or arresting the Galicia Defender and its reliance therefore upon the Suits in Admiralty Act, 46 U.S.C. § § 741, 742 for *in personam* relief.[4] The majority does not consider the problem. It is content with the explanation that section 742 does not give the lienholder "greater rights against the Government than it would have against a private charterer." Since Everett recovered a pro rata share of the proceeds from the *in rem* proceeding in which it intervened against the ship, the majority say that it is entitled to no more.

But the very purpose of the Act is to permit not only a recovery *in rem*, but one *in personam* as well, when the

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[4]Suits in Admiralty Act, March 9, 1920, 41 Stat. 525; 46 U.S.C. §§ 741-752. The Act provides in pertinent part:

"§ 741 Exemption of United States vessels and cargoes from arrest or seizure

"No vessel owned by the United States . . . or in the possession of the United States . . . and no cargo owned or possessed by the United States . . . shall, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: Provided, That this chapter shall not apply to the Panama Railroad Company."

"§ 742 Libel in personam

"In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States . . . . Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States . . . ."

claim is within the framework of the statute. Section 743 provides in part:

> "If the libelant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. . . ."[5]

The majority argue that the limitation of liability provision of the Act, 46 U.S.C. § 746, precludes recovery by Everett of any sums in excess of its pro rata share of the total amount of liens against the vessel in the *in rem* proceeding. They cite *McMahon v. Pan American World Airways, Inc.*, 297 F.2d 268 (5th Cir. 1962). It does not so hold. Nor do any of the cases cited by the Government. What they do hold is that

> "The extent of his damages is measured by the value of the vessel at the time his libel is filed, when she could be seized, if privately owned." *Hudson Trading Co. v. United States (The Aberfoil)*, 28 F.2d 744, 747 (3rd Cir. 1928).

Even this quoted liability *in rem* is placed in question by *Eastern Transportation Company v. United States*, 272 U.S. 675 (1927), where the offending vessel was a complete wreck, yet *in personam* liability was sustained without limitation.

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[5]The fact that some portion of the claim may have been incurred prior to the demise charter to the United States does not defeat recovery. The recovery sought against the United States is not *ex contractu*, but on a statutory right granted as *quid pro quo* for preventing the creditor from arrest and seizure of the ship in assertion of ordinary maritime liens.

Here it is plain that Everett elected to and did proceed *in rem;* it is also clear that it continued to insist on its *in personam* remedy against both the United States and against Liberty, the owner under its appointment as husbanding agent. It is entitled to try its case.

I would remand to the trial court for further proceedings consistent with the views expressed herein.

Appendix B

In the United States District Court for the Northern District of California

Case No. 49228-ACW

In Re SS Norberto Capay and SS Galicia Defender

ORDER GRANTING DEFENDANT UNITED STATES' MOTION FOR SUMMARY JUDGMENT UNDER RULE 56

Everett Steamship Corporation attempts to sue the United States *in personam* under the provisions of 46 U.S.C. § 742. Everett's first complaint was dismissed without prejudice for a variety of reasons detailed in this Court's Order of May 28, 1970. The amended complaint, filed June 17, 1970, asks reimbursement for damages allegedly caused Everett by the immunity of the SS Galicia Defender to *in rem* proceedings while under charter to the United States. 46 U.S.C. § 741. It is said that because of this immunity Everett suffered a loss of priority for certain maritime liens, the result of which was that when Everett finally did proceed *in rem* against the vessel, it recovered only a small portion of the total amount covvered by its liens.

Everett's second complaint does not improve on the first. The loss of priority as to the Corporation's liens was due to factors which would have been equally applicable had the Galicia Defender remained in exclusively private hands. While on the high seas, neither the De-

fender nor any private vessel would have been within the reach of an *in rem* action. Similarly, while in foreign ports, any vessel, private or public, would be subject to seizure. 46 U.S.C. § 747. The ability of the Secretary of State to intercede in favor of the government ship is discretionary (1960 Op. Atty. Gen. November 30) and in no way made it particularly impractical for Everett to act. Thus, as the Defender plied its way between the United States and the Far East, and Everett did not act, new lienholders acquired preference over old, in accordance with the classic admiralty rule which would have obtained even had the Defender been entirely a private vessel.

Finally, the Court is faced with the indisputable fact that Everett did participate in the seizure, judicial sale, and proceeds therefrom, of the Galicia Defender upon its return to this country. Everett claims that this seizure was violative of § 741 which states that no government owned or operated ship "*shall* . . . be subject to arrest or seizure". The Galicia Defender was a privately owned vessel; whether she was "operated" by the United States and thus subject to § 741 depends in large part upon the terms of her charter. Under the charter herein, the Galicia Defender, if arrested while in United States waters, could be declared "off-hire" in which case it would not be government "operated" and subject to the immunity of § 741. The Court sees no inconsistency between this arrangement and the philosophy of §§ 741-42, which is to put the government in the same position, and no worse, as a private owner or operator. See *United States v. Daniels Towing & Drydock*, 214 F.2d 501 (1954) for an example of the government's ability to contract itself

out of liability for liens incurred by other parties with interests in vessels otherwise subject to § 741. See also *The Pocahontas,* 278 F.214 (1921).

The government's motion will be treated as one for summary judgment under Rule 56. The motion is hereby GRANTED.

Dated: October 6, 1970.

Albert C. Wollenberg
United States District Judge

Appendix C

SUITS IN ADMIRALTY ACT

§ 741. *Exemption of United States vessels and cargoes from arrest or seizure*

No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this chapter shall not apply to the Panama Railroad Company. Mar. 9, 1920, c. 95, §1, 41 Stat. 525.

§ 742. *Libel in personam*

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve

a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States. As amended Sept. 13, 1960, Pub.L. 86-770, § 3, 74 Stat. 912.

§ 743. *Procedure in cases of libel in personam*

Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or a corporation mentioned in section 741 of this title may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever

it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. Mar. 9, 1920, c. 95, § 3, 41 Stat. 526.

§ 744. *Release of privately owned vessel after seizure*

If a privately owned vessel not in the possession of the United States or of a corporation described in section 741 of this title is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such corporation, such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that it is interested in such cause, desires such release, and assumes the liability for the satisfaction of any decree obtained by the libelant in such cause, and thereafter such cause shall proceed against the United States in accordance with the provisions of this chapter. Mar. 9, 1920, c. 95, § 4, 41 Stat. 526.

§ 745. *Causes of action for which suits may be brought; limitations; exceptions; actions which may not be revived; interest on claims*

Suits as authorized by this chapter may be brought only within two years after the cause of action arises:

Provided, That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim: *Provided further,* That the limitations contained in this section for the commencement of suits shall not bar any suit against the United States brought hereunder within one year after December 13, 1950, if such suit is based upon a cause of action whereon a prior suit in admiralty or an action at law was timely commenced and was or may hereafter be dismissed solely because improperly brought against any person, partnership, association, or corporation engaged by the United States to manage and conduct the business of a vessel owned or bareboat chartered by the United States or against the master of any such vessel: *And provided further,* That after June 30, 1932, no interest shall be allowed on any claim prior to the time when suit on such claim is brought as authorized by section 742 of this title unless upon a contract expressly stipulating for the payment of interest. Mar. 9, 1920, c. 95, § 5, 41 Stat. 526; June 30, 1932, c. 315, 47 Stat. 420; Dec. 13, 1950, c. 1136, 64 Stat. 1112.

§ 746. *Exemptions and limitations of liability*

The United States or a corporation described in section 741 of this title shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels. Mar. 9, 1920, c. 95, § 6, 41 Stat. 527.

§ 747. *Seizures in foreign jurisdictions*

If any vessel or cargo within the purview of sections 741 and 744 of this title is arrested, attached, or otherwise seized by process of any court in any country other than the United States, or if any suit is brought therein against the master of any such vessel for any cause of action arising from, or in connection with, the possession, operation, or ownership of any such vessel, or the possession, carriage, or ownership of any such cargo, the Secretary of State of the United States in his discretion, upon the request of the Attorney General of the United States, or any other officer duly authorized by him, may direct the United States consul residing at or nearest the place at which such action may have been commenced to claim such vessel or cargo as immune from such arrest, attachment, or other seizure, and to execute an agreement, undertaking, bond, or stipulation for and on behalf of the United States, or the Secretary of Commerce, or a corporation described in section 741 of this title as by said court required, for the release of such vessel or cargo, and for the prosecution of any appeal; or may, in the event of such suits against the master of any such vessel, direct said United States consul to enter the appearance of the United States, or of the Secretary of Commerce, or of such corporation, and to pledge the credit thereof to the payment of any judgment and cost that may be entered in such suit. The Attorney General is vested with power and authority to arrange with any bank, surety company, person, firm, or corporation in the United States, its Territories and possessions, or in any foreign country, to execute any such aforesaid bond or stipulation as surety or stipulator

thereon, and to pledge the credit of the United States to the indemnification of such surety or stipulator as may be required to secure the execution of such bond or stipulation. The presentation of a copy of the judgment roll in any such suit, certified by the clerk of the court and authenticated by the certificate and seal of the United States consul claiming such vessel or cargo, or his successor, and by the certificate of the Secretary of State as to the official capacity of such consul, shall be sufficient evidence to the proper accounting officers of the United States, or of the Secretary of Commerce, or of such corporation, for the allowance and payment of such judgments: *Provided, however,* That nothing in this section shall be held to prejudice or preclude a claim of the immunity of such vessel or cargo from foreign jurisdiction in a proper case. Mar. 9, 1920, c. 95, §7, 41 Stat. 527; Ex.Ord.No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§ 204, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1276, 1277.

§ 748. *Payment of judgment, award, or settlement*

Any final judgment rendered in any suit herein authorized, and any final judgment within the purview of sections 744 and 747 of this title, and any arbitration award or settlement had and agreed to under the provisions of section 749 of this title, shall, upon the presentation of a duly authenticated copy thereof, be paid by the proper accounting officers of the United States out of any appropriation or insurance fund or other fund especially available therefor; otherwise there is appropriated out of any money in the Treasury of the United States

not otherwise appropriated, a sum sufficient to pay any such judgment or award or settlement. Mar. 9, 1920, c. 95, § 8, 41 Stat. 527.

§ 749. *Arbitration, compromise, or settlement of claims*

The Secretary of any department of the Government of the United States, or the board of trustees of corporations mentioned in section 741 of this title, are, and each is, authorized to arbitrate, compromise, or settle any claim in which suit will lie under the provisions of sections 742, 744, and 750 of this title.

§ 750. *Recovery for salvage services by vessel or crew*

The United States, and the crew of any merchant vessel owned or operated by the United States, or a corporation mentioned in section 741 of this title, shall have the right to collect and sue for salvage services rendered by such vessel and crew, and any moneys recovered therefrom by the United States for its own benefit, and not for the benefit of the crew, shall be covered into the United States Treasury to the credit of the department of the Government of the United States, or of such corporation, having control of the possession or operation of such vessel. Mar. 9, 1920, c. 95, § 10, 41 Stat. 528; Ex.Ord.No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, § 904, 49 Stat. 2016; 1950 Reorg.Plan No. 21, §§ 204, 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1276, 1277.

§ 751. *Disposition of moneys recovered by United States*

All moneys recovered in any suit brought by the United States on any cause of action arising from, or in connec-

tion with, the possession, operation, or ownership of any merchant vessel, or the possession, carriage, or ownership of any cargo, shall be covered into the United States Treasury to the credit of the department of the Government of the United States, or of the corporations mentioned in section 741 of this title, having control of the vessel or cargo with respect to which such cause of action arises, for reimbursement of the appropriation, or insurance fund, or other funds, from which the loss, damage, or compensation for which said judgment was recovered has been or will be paid. Mar. 9, 1920, c. 95, § 11, 41 Stat. 528; Ex.Ord.No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg.Plan No. 21, §§ 204, 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1276, 1277.

§ 752. *Reports as to awards and settlements*

The Secretary of any department of the Government of the United States, and the board of trustees of any corporation mentioned in section 741 of this title, shall report to the Congress at each session thereof the arbitration awards or settlements of claims which shall have been agreed to under this chapter since the previous session, and in which the time to appeal shall have expired or have been waived. Mar. 9, 1920, c. 95, § 12, 41 Stat. 528; Ex.Ord.No. 6166, § 12, June 10, 1933; June 29, 1936, c. 858 §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg.Plan No. 21, §§ 204, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1276, 1277; Aug. 30, 1954, c. 1076, § 1(26), 68 Stat. 968.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

EVERETT STEAMSHIP CORPORATION, S/A, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, as husbanding agent[1] for the S.S. Galicia Defender, advanced to the credit of the vessel $20,040.47 for repairs, supplies, and wages for the crew between February 1, 1967 and February 2, 1968. On May 4, 1968, the United States chartered the S.S. Galicia Defender on a demise or "bareboat" basis. On May 17, 1968, petitioner filed in the United States District Court for the Northern District of California a complaint under the Suits in Admiralty Act (46 U.S.C. 741 *et seq.*) seeking *in personam* recovery from the United States in the amount of the advances. The district court granted summary judgment in favor of the

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[1] A "husbanding agent" purchases supplies and stores, advances funds for payment of wages, procures repairs, and in other ways assists a vessel and its master in getting in and out of port.

United States, and the court of appeals affirmed on the ground that the United States could not be held liable *in personam* for the advances (Pet. App. vi-vii).

The nub of this case is petitioner's contention that, since 46 U.S.C. 741 precludes libelants with claims against vessels owned or controlled by the United States from proceeding *in rem* against the vessels, and instead permits those libelants to proceed only *in personam* against the United States under 46 U.S.C. 742, in such *in personam* proceedings the liability of the United States is wholly substituted for the liability of the vessel. But the court of appeals' rejection of that contention does not conflict with the decisions of any other courts, and the issue raised in this case is not of sufficient general importance to warrant further review by this Court.

1. The Suits in Admiralty Act was enacted chiefly to waive sovereign immunity and yet to relieve the United States of the obstruction to its commercial traffic caused by the seizure of its merchant vessels. See *James Shewan & Sons, Inc.* v. *United States,* 266 U.S. 108, 111. The Act specifies that "[n]o vessel owned by the United States * * * shall, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions." 46 U.S.C. 741. Instead of the traditional *in rem* procedure, the Act creates the following remedy: "In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States * * *." 46 U.S.C. 742. Furthermore, "[s]uch suits shall proceed

and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties." 46 U.S.C. 743.

As the courts have long recognized, the Suits in Admiralty Act "merely substitutes a *remedy* in personam for one in rem * * *." *United States* v. *Neptune Line, Inc.*, 12 F. 2d 568, 571 (C.A. 4) (emphasis added). It does not substitute the *liability* of the United States for the *liability* of the vessel. *Ibid.* The Act "gives a libelant no greater right against the United States than he would have against a private party." *McMahon* v. *Pan American World Airways, Inc.*, 297 F. 2d 268, 269 (C.A. 5). Indeed, the Act itself provides that "[t]he United States * * * shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators or agents of vessels." 46 U.S.C. 746.

Accordingly, petitioner, in its *in personam* suit against the United States under 46 U.S.C. 742, could recover only that which it would have been able to recover from a private party who had demise chartered the S.S. Galicia Defender on May 4, 1968, when the United States did so.

2. Had a private party, instead of the United States, demise chartered the S.S. Galicia Defender on May 4, 1968, petitioner would have been unable to recover *in personam* from that party. A demise charterer is generally treated in admiralty as the owner of the vessel from the effective date of the charter. *Reed* v. *The Yaka*, 373 U.S. 410, 412. Hence, on the date the demise charter takes effect the charterer assumes all *in personam* liabilities arising out of the vessel's subsequent operation. Gilmore & Black, *The Law of Admiralty* 218

(1957). However, although the demise charterer acquires the vessel itself subject to its liens, the demise charterer would not assume the *in personam* liabilities of the former owner, absent an express agreement to the contrary. Therefore, had a private party demise chartered the S.S. Galicia Defender on May 4, 1968, that party would not have been liable *in personam* to petitioner for advances made to the credit of the vessel prior to May 4, 1968, although in such a situation petitioner could have enforced its lien covering the advances by proceeding *in rem* against the vessel. It follows that the United States could not be liable *in personam* to petitioner for the advances made prior to May 4, 1968.

Of course, under 46 U.S.C. 742 the United States was answerable to petitioner for the pro rata share to which petitioner would have been entitled in an *in rem* proceeding against the vessel if it had been chartered by a private party, and if the vessel was subject to *in rem* jurisdiction at the time the suit was filed. See *Blamberg Bros.* v. *United States,* 260 U.S. 452. As it happens, the S.S. Galicia Defender was declared off-hire by the United States and sold in an *in rem* proceeding in which petitioner participated. Petitioner recovered its pro rata share in that proceeding, commensurate with the priority of its maritime lien. The court of appeals correctly held that this was all that petitioner was entitled to recover.[2]

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[2]Petitioner's real grievance is that the amount it recovered in the *in rem* proceeding was less than it would have recovered in a similar proceeding at an earlier date, because higher priority liens had accrued in the interim. The court of appeals correctly rejected petitioner's admittedly unprecedented theory that the United States should be held responsible for the loss in value of petitioner's lien, noting that the loss was caused in part by petitioner's delay in pursuing its legal remedies (Pet. App. vi-vii). Cf. *United States* v. *Neptune Line, Inc., supra.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.